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No. 88-254

In The

Supreme Court of the United States

October Term, 1988

COLIN C. J. ANGLICKER, M.D.

vs.

BENJAMIN F. MILLER, JR.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the rule of *Brady v. Maryland* apply to a criminal trial in which the defendant is found not guilty by reason of insanity when such a verdict requires as a prerequisite that the defendant be found beyond a reasonable doubt to have committed the criminal act alleged?

2. Was the Court of Appeals correct in holding that the lower courts erred in refusing to apply the holding of this Court in *Pennsylvania v. Ritchie* concerning materiality of exculpatory evidence?

3. Was the Court of Appeals correct in holding that there is a reasonable probability that the withheld exculpatory evidence in this case, had it been disclosed, would have caused the Respondent – who always had insisted he was innocent – to contest the state's claims rather than agreeing to a finding of criminal insanity?

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COUNTERSTATEMENT OF THE CASE

The facts of this case are set forth in the opinion of the United States Court of Appeals for the Second Circuit, 848 F.2d 1312 (2d Cir. 1988), printed at pages 3A-14A of the appendix to the petition.

Benjamin Miller's 1972 arrest on five counts of murder culminated a five-year investigation into a series of murders of young black prostitutes, all of whom were found strangled in a wooded area off the Merritt Parkway in Stamford, Connecticut. The victims were Rosella Rush Payda, Donna Roberts, Gloria Conn, Gail Thompson and Alma Henry. The police investigation was spurred, in its final stages, by what the prosecutor described as "a substantial amount of publicity in the Stamford area" and anger in the black community over the failure of police to solve the crimes.

It was never clear why police began investigating Mr. Miller, who was a white clerical employee of the Darien post office who moonlighted as a street corner preacher in the Stamford black community. Upon investigating Mr. Miller, however, police learned that he had a history of psychiatric hospitalization. Attempts to interview him were considered unproductive because, although he insisted upon his innocence, he appeared incoherent and emotionally unstable. Police therefore enlisted the assistance of the superintendent of a state psychiatric hospital in Fairfield County, who agreed to assist in the investigation if Mr. Miller could be committed to his custody. When Mr. Miller refused to admit himself voluntarily, the police persuaded the director of a Norwalk psychiatric clinic to commit him involuntarily on February 16, 1972.

He was found upon arrival at the hospital to be "delusional," schizophrenic, and possibly suicidal, but insisting that he was innocent of the murders with which he had been accused.

Mr. Miller was interrogated extensively by the superintendent of the hospital and subsequently by State Police detectives for a period of approximately one month. Throughout those interrogations, psychiatric notes described Mr. Miller as "delusional," "suicidal," and "asking for legal aid." Those requests were ignored, and Mr. Miller eventually signed a series of confessions to the murders.

Mr. Miller's arrest in March of 1972 was announced at a televised press conference conducted by the Mayor of Stamford and the Commissioner of the Connecticut State Police Department, both of whom assured the press that Mr. Miller was certainly guilty of all the murders.

Mr. Miller was arraigned and public defender Herbert J. Bundock was appointed to represent him. The Court ordered a competency examination to be conducted by the very same psychiatrist who had supervised the interrogation. That psychiatrist filed a report asserting that Mr. Miller was mentally ill but able to stand trial.

Without consulting with Mr. Miller and without any supporting psychiatric evidence, Attorney Bundock waived Mr. Miller's right to a jury trial, chose not to attack the confessions, and decided to pursue exclusively the defense of insanity. Although Mr. Miller consistently insisted to Mr. Bundock that he had not killed any of the women, Bundock testified that he considered it "unnecessary to do anything with that information . . . this was a

statement that is made invariably by persons who are accused of offenses . . . I didn't consider it to be of paramount importance."

On July 29, 1972, while Mr. Miller was awaiting trial, Robert F. Lupinacci was caught in the act of strangling a young black female prostitute at the exact same location on the Merritt Parkway at which the bodies of the other five victims had been found. Subsequent police investigation disclosed, and the prosecutor was advised, that Lupinacci had been a regular patron of the prostitutes in the Stamford area and had been seen in the company of at least one of the earlier victims the night she was killed. He was known to have been aware of facts concerning the murders which had not been disclosed to the public and presumably were known only to the killer. His car had been seen at the location of the murders on previous occasions. A deck of pornographic playing cards was found in the trunk of his automobile. Missing from that deck was a Queen of Hearts which had been found at the scene of the Gail Thompson murder. Vacuum sweepings taken from the trunk of his car revealed "a negroid limb hair" which corresponded with State Police evidence that one of the victims had been transported in the trunk of the murderer's car. He had a previous history of being prosecuted for rape. None of this information was disclosed by the prosecutor to Attorney Bundock.

In accordance with an off-the-record agreement between Mr. Bundock and the prosecutor, respondent's trial was limited to the presentation of prima facie evidence by the state, which was not contested by Mr. Bundock, and a stipulation by both attorneys that Mr. Miller be found not guilty by reason of insanity.

At the habeas corpus hearing in this case, the director of the University of Connecticut Law School Criminal Clinic, who is the educational consultant to the Connecticut Public Defender system, testified that Bundock's handling of Mr. Miller's defense was in several respects not reasonably competent or within the range of competence displayed by lawyers of ordinary skill and training in criminal law practicing in Bridgeport in 1972.

Mr. Miller filed a habeas corpus petition in the Connecticut Superior Court in 1982, alleging that his conviction was based upon the unconstitutional withholding by the prosecutor of exculpatory information and the denial of effective assistance of counsel at his trial. The habeas corpus petition was denied, and that ruling was affirmed on direct appeal. A habeas corpus petition then was filed in the United States District Court for the District of Connecticut, and denied there on July 28, 1987. All courts agreed that the prosecutor had unconstitutionally withheld exculpatory information from Attorney Bundock. They refused to apply the materiality test of *United States v. Agurs*, 427 U.S. 97, 107 (1976), and *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1001 (1987), and instead applied a test without any authority in the law - requiring Mr. Miller to prove that it was reasonably certain that the outcome of his trial "would have been different" had the exculpatory information been disclosed and holding further that Mr. Miller could meet that burden only by proving that Attorney Bundock would certainly have pursued a different defense strategy had he received the evidence.

The Second Circuit held that the lower courts erred in these holdings.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE RULE OF *BRADY V. MARYLAND* APPLIES TO A CRIMINAL TRIAL IN WHICH THE DEFENDANT IS FOUND NOT GUILTY BY REASON OF INSANITY WHEN SUCH A VERDICT REQUIRES AS A PREREQUISITE THAT THE DEFENDANT BE FOUND BEYOND A REASONABLE DOUBT TO HAVE COMMITTED THE CRIMINAL ACT ALLEGED.

The result of the stipulated verdict of not guilty by reason of insanity in this case is that Benjamin Miller received a life sentence to a state institution for the criminally insane based upon a finding that he was dangerous to himself or others proven solely by a simple preponderance of the evidence (Conn. Gen. Stat. §53a-47) rather than by clear and convincing evidence which would have been required in the case of a civil commitment. *Addington v. Texas*, 441 U.S. 418, 432-33 (1979). Under Connecticut law, the finding that Mr. Miller was not guilty by reason of insanity required that the state prove beyond a reasonable doubt that he had in fact committed the murders with which he was charged. *State v. Warren*, 169 Conn. 207, 363 A.2d 91 (1975). See also *Warren v. Harvey*, 472 F. Supp. 1061 (D.Conn. 1979), *aff'd*, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980). In this case, as in all Connecticut cases at that time involving the insanity defense, Attorney Bundock and the prosecutor stipulated, in effect, that Mr. Miller committed the murders. (App. p. 16A)

Under these circumstances, the Second Circuit clearly was correct in holding that *Brady v. Maryland*, 373 U.S. 83 (1963), applies.

II. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE LOWER COURTS ERRED IN REFUSING TO APPLY THE HOLDING OF THIS COURT IN *PENNSYLVANIA V. RITCHIE* CONCERNING MATERIALITY OF EXCULPATORY EVIDENCE.

The petition for a writ of certiorari in this case does not even question the fundamental holding of the Second Circuit that the district court and the state courts committed constitutional error in refusing to apply *Pennsylvania v. Ritchie*, 107 S.Ct. 989, 1001 (1987), and *United States v. Agurs*, 427 U.S. 97, 112 (1976). Since the State of Connecticut effectively concedes that the Second Circuit was correct in finding such constitutional error, certiorari should be denied in this case. See the Second Circuit's discussion of this issue at pages 18A-20A of the appendix to the petition.

III. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THERE IS A REASONABLE PROBABILITY THAT THE WITHHELD EXCULPATORY EVIDENCE IN THIS CASE, HAD IT BEEN DISCLOSED, WOULD HAVE CAUSED THE RESPONDENT - WHO ALWAYS HAD INSISTED HE WAS INNOCENT - TO CONTEST THE STATE'S CLAIMS RATHER THAN AGREEING TO A FINDING OF CRIMINAL INSANITY.

The Petitioner's argument, and the holdings of the lower courts, all are based upon a fundamental error - the

belief that, when an insanity defense requires the effective admission that the criminal acts have been committed, the decision to stipulate those facts is exclusively the decision of the defense lawyer and not one involving the defendant himself. Thus, Petitioner and the lower courts all claim that the test of materiality should proceed upon an analysis of whether the lawyer would have adopted a different defense had he known the exculpatory facts. But in this case, as the Connecticut courts have held and as both the defense attorney and the prosecutor testified at the habeas corpus hearing here, the assertion of an insanity defense required that the defense stipulate, as it did here, that indeed Mr. Miller had committed the murders.

The Second Circuit clearly is correct, on such facts, in holding that the insanity defense in a case like this one is most closely analogous to a guilty plea. Thus, as the Second Circuit held, the question should be decided by looking to the test of materiality delineated by this court in *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The Second Circuit was correct in holding that "the right to decide whether to plead guilty, or not guilty, or not guilty by reason of insanity belongs to the defendant, not to counsel." (App. p. 22A) That being so, it follows inevitably that the lower courts applied a constitutionally erroneous test and that the Second Circuit was correct in reversing.

There is no difficulty in resolving the question whether the exculpatory evidence, had it been presented to Mr. Miller, probably would have caused Mr. Miller to

fight his case rather than stipulating that he had committed the murders. The evidence at the habeas corpus hearing showed without challenge that Mr. Miller had always insisted upon his innocence of the crimes and had expressed the desire to fight his case. He consistently explained that his "confessions" had been coerced and were not true. Even the Connecticut State Police, when they learned of the Lupinacci evidence, stated in documents which were made exhibits at the habeas corpus hearing that it was assumed Mr. Miller would fight the case and assert as his defense that Lupinacci had committed the crimes.

CONCLUSION

The decision of the Court of Appeals should be allowed to stand. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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